

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 480.

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

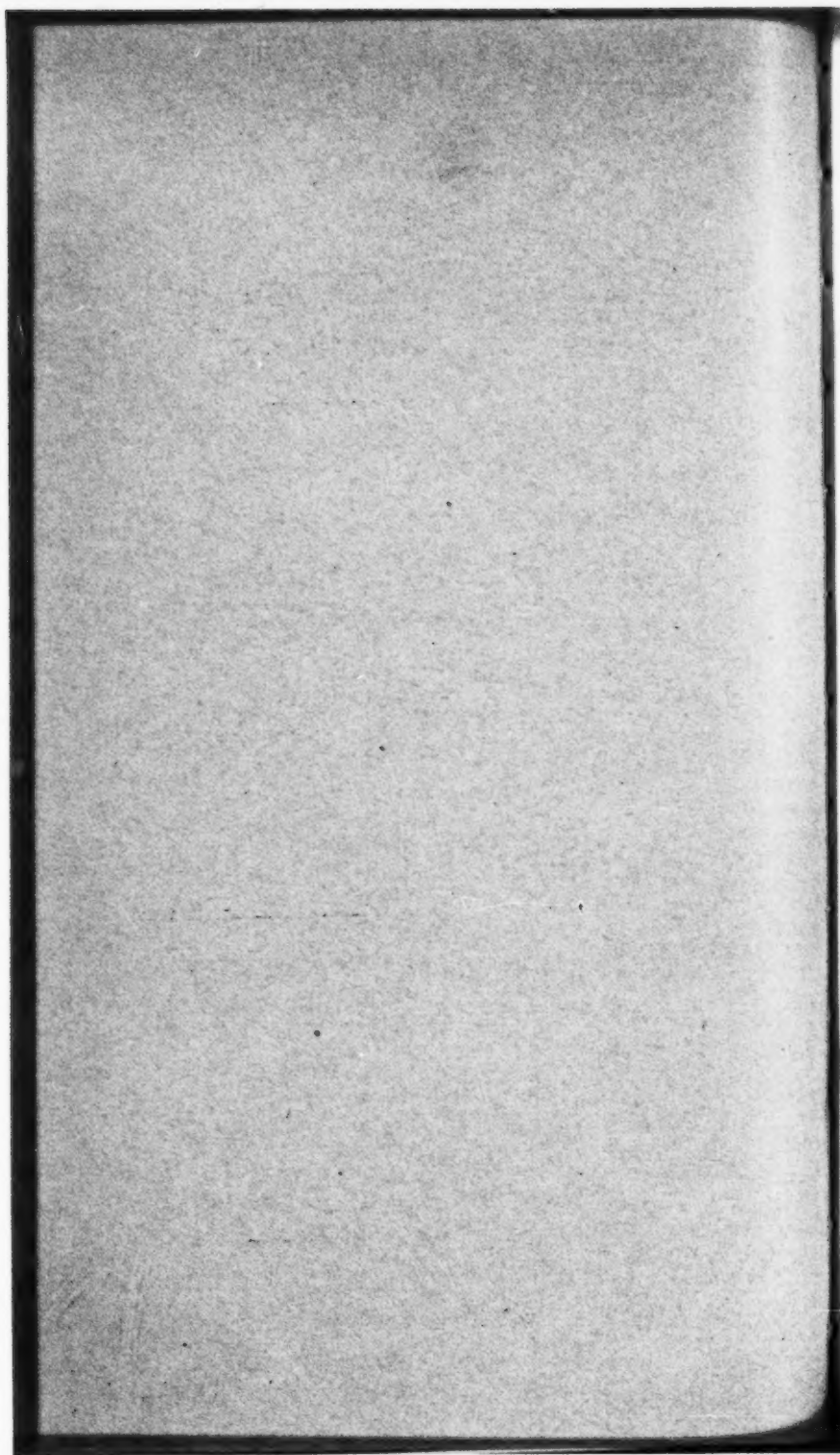
VS.

FRANK BALINT AND ALFONSO RANDAZZO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 17, 1921.

(28435)



THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

VS.

FRANK BALINT AND ALFONSO RANDAZZO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the district court before you, or some of you, between United States of America, plaintiff in error, and Frank Balint and Alfonso Randazzo, defendants in error, a manifest error hath happened to the great damage of the United States of America, plaintiff in error, as is said and appears by said judgment and the complaint of the said United States of America, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the Supreme Court of the United States at the Capitol at Washington, in the District of Columbia, together with this writ, so that you have the same at the said place before the judges aforesaid, on the 26th day of August, 1921, that the record and proceedings aforesaid being inspected, the said judges of the Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 28th day of July, in the year of our Lord, one thousand nine hundred and twenty-one and of the independence of the United States the one hundred and forty-sixth.

[L.S.]

ALEX. GILCHRIST, JR.,

Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

JNO. C. KNOX,

U. S. District Judge.

3 United States Supreme Court. Court docket No. 316. Form No. 336. The United States of America, plaintiff in error, versus Frank Balint and Alfonso Randazzo, defendants in error. Writ of error and allowance. William Hayward, United States attorney, attorney for plaintiff in error. Due service of a copy of the within is hereby admitted. New York, July 28, 1921. Samuel Furstenburg, attorney for defendants.

Filed July 28, 1921. United States District Court, Southern District of New York.

4 UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, Alex. Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, in the Sec-

and Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 4 to 14, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of

United States of America, plaintiff in error,
against
Frank Balint and Alfonso Randazzo, defendants in error,

as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern District of New York, in the Second Circuit, this 9th day of August, in the year of our Lord one thousand nine hundred and twenty-one and of the independence of the United States the one hundred and forty-sixth.

[SEAL.]

ALEX. GILCHRIST, JR., *Clerk*.

5 In the District Court of the United States of America for the Southern District of New York.

SOUTHERN DISTRICT OF NEW YORK, ss.:

The grand jurors of the United States of America duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that district, upon their oath present that heretofore, to wit, on April 15, 1921, at the Southern District of New York and within the jurisdiction of this court, Frank Balint and Alfonso Randazzo, hereinafter called the defendants, did unlawfully sell, barter, and give to another, to wit, Peter Reager, a compound, manufacture, and derivative of opium, namely, about 10 grains of heroin hydrochloride, and a compound, manufacture, and derivative of coca leaves, namely, about 10 grains of cocaine hydrochloride, the said selling, bartering, and giving of said cocaine and said heroin being not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 2 of the act of December 17, 1914, as amended by the act of February 24, 1919.)

Second count.

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on April 16, 1921, Frank Balint and Alfonso Randazzo, hereinafter called the defendants, did at and within the Southern District of New York and within the jurisdiction of this court, unlawfully sell, barter, and give to another, to wit, Peter Reager, a compound, manufacture, and derivative of

opium, namely, about 10 grains of heroin hydrochloride, and a compound, manufacture, and derivative of coca leaves, namely, about 10 grains of cocaine hydrochloride, the said selling, bartering, and giving of said cocaine and said heroin being not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 2 of the act of December 17, 1914, as amended by the act of February 24, 1919.)

FRANCIS G. CAFFEY,

United States Attorney.

May 23, 1921, filed demurrer. June 14, 1921, demurrer argued; Knox, J. June 29, demurrer sustained; opinion, Knox, J.

Form No. 235. U. S. District Court. The United States of America vs. Frank Balint and Alfonso Randazzo. Indictment. Unlawfully selling cocaine and heroin. §2 of the act of December 17, 1914, as amended by the act of February 24, 1919. Francis G. Caffey, U. S. attorney. A true bill. John E. Ingersoll, foreman. U. S. District Court, S. D. of N. Y. Filed May 17, 1921.

Demurrer, filed May 24, 1921.

DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE
SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

FRANK BALINT AND ALFONSO RANDAZZO, DEFENDANTS.

The above-named defendants hereby demur to the indictment 28 316 filed against them in this court on the 23rd day of May, 1921, charging them with the crime of unlawfully selling cocaine and heroin, on the ground that it appears upon the face thereof:

First: That the facts stated do not constitute a crime.

Wherefore the defendants ask judgment of the court that they be dismissed and discharged from the said premises specified in the said indictment.

Dated New York, May 23rd, 1921.

SAMUEL FURSTENBERG,

Attorney for Defendants.

Endorsed: U. S. District Court, S. D. of N. Y. Filed May 23, 1921.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA	}
<i>against</i>	
FRANK BALINT AND ALFONSO RANDAZZO.	
defendants.	

Upon demurrer to indictment.

William Hayward, United States Attorney (Peter B. Olney, Jr., Ass't U. S. Attorney, of Counsel), for United States of America.

Samuel Furstenburg, for defendants.

Knox, D. J.: Section 2 of the so-called Harrison narcotic law provides that "it shall be unlawful for any person to sell, barter, exchange, or give away" any compound, manufacture, or derivative of opium or of cocoa leaves "except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

In an indictment of two counts, each of which follows the words of the statute, the defendants are charged with doing the prohibited acts. To this indictment both defendants have demurred upon the ground that neither count thereof contains any allegation of scienter upon the part of the defendants.

The Government contends that such allegation is unnecessary by reason of the fact that the statute makes no provision that the crimes denounced thereby should be knowingly and wilfully committed, and cites in support of its position the line of cases of which *U. S. v. Malone*, 9 Fed. 897 (unlawful distilling); *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U. S. 57 (the unlawful cutting of timber); and *Armour Packing Co. v. U. S.*, 209 U. S. 56 (involving the departure from filed and published interstate commerce tariffs), are familiar examples.

In the last-mentioned case it was said:

"While intent is in a certain sense essential to the commission of a crime, and in some cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases * * * where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong."

But isn't it true that such violations of the Harrison law as are most frequently prosecuted involve turpitude and moral wrong?

In *U. S. v. Jim Fuey Moy*, 241 U. S. 394, 402, the Supreme Court, while sustaining the Harrison law upon the ground that it was a revenue measure, nevertheless said that "It may be assumed that the statute has a moral end as well as revenue in view * * *" and, considering the severity of the punishment which may be imposed

upon persons guilty of violating the provisions of the statute, there is ample support for such statement.

Indeed, by way of argument that scienter is not a necessary ingredient of the crime charged against the defendants, the Government says that the failure of Congress to use the words "wilfully and knowingly" in defining the offense complained of indicates that the act "is both a revenue measure and remedial, having for its purpose not only the raising of revenue and the prevention of fraud in that direction, but also the moral end of preventing the dissemination of cocaine and morphine; drugs of great potential danger to the public when improperly used, and that those who deal in such drugs do so at their peril * * *."

It thus seems to me that an unlawful sale of narcotics is of such nature as properly to be regarded as malum in se, and to thus necessitate, in an indictment therefor, words of scienter.

For all that is said against these defendants, they may not purposely have sold the narcotics; and such must have been their purpose even under the Armour Packing Co. case (supra).

For these reasons I hold the demurrer well taken, and the same will be sustained.

June 28, 1921.

JNO. C. KNOX,
U. S. District Judge.

11 *Order sustaining demurrer and dismissing indictment.*

United States District Court Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

FRANK BALINT AND ALFONSO RANDAZZO, DEFENDANTS.

An indictment against Frank Balint and Alfonso Randazzo, the defendants above named, having been found and filed by the grand jurors in and for the Southern District of New York on May 17, 1921, and thereafter the defendants having been arraigned and having interposed a demurrer to said indictment on May 23, 1921, and thereafter Samuel Furstenburg, Esq., having been heard in support of the demurrer, and Peter B. Olney, jr., assistant United States attorney, having been heard on behalf of the United States of America.

Now, upon motion of Samuel Furstenburg, Esq., attorney for the defendants, it is

Ordered and adjudged that the demurrer be and the same hereby is sustained and the said indictment be and the same hereby is dismissed.

Dated New York, July 8, 1921.

JNO. C. KNOX,
U. S. District Judge.

The above is consented to as to form :

SAMUEL FURSTENBERG,
Attorney for Defendants.

Endorsed: Service admitted. U. S. District Court, S. D. of N. Y.
Filed Jul. 8, 1921.

12 United States District Court Southern District of New York.

UNITED STATES OF AMERICA	} C. 28-136.
<i>vs.</i>	
FRANK BALINT AND ALFONSO RANDAZZO.	

1921.

May 17. Filed indictment.

23. " demurrer.

23. " recognizance Balint-New Amst. Cas. Co., \$1,000.

23. " " Randazzo " " " " \$1,000.

Jun. 14. ——— Demurrer argued. Knox, J.

" 29. Demurrer sustained. Knox, J. (Op. 1581.)

Jul. 8. Filed order sustaining demurrer and dismissing indictment. Knox, J.

" 28. Filed petition for writ of error, assignment of errors, writ of error, and citation. Knox, J.

13 *Petition for allowance of writ of error.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.	}
<i>against</i>	
FRANK BALINT AND ALFONSO RANDAZZO, DEFENDANTS IN ERROR.	

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above-named plaintiff in error, United States of America, by William Hayward, United States attorney for the Southern District of New York, feeling aggrieved by the judgment entered herein on July 8, 1921, sustaining the demurrer to the indictment herein and dismissing the said indictment, and which said judgment is based upon a construction of the statute upon which the said indictment is founded, namely, the act of December 17, 1914, 38 U. S. Stat. L., p. 785-6, as amended by the act of February 24, 1919, 40 U. S. Stat. L., p. 1130, petitions this court for an order allowing the United States of America to prosecute a writ of error to the Supreme Court of the United States for the reasons specified in the assignments of error which are filed herein, and the said United States of America prays that this writ of error will be allowed and that a

transcript of the legal proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the said court.

Dated New York, N. Y., July 27, 1921.

WILLIAM HAYWARD,

United States Attorney for the Southern District of New York, Attorney for Plaintiff in Error, United States of America. Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Endorsed: Service admitted. U. S. District Court, S. D. of N. Y. Filed Jul. 28, 1921.

14

Assignments of error.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

against

FRANK BALINT AND ALFONSO RANDAZZO, DEFENDANTS IN }
error. }

Now comes the United States of America, plaintiff in error, by William Hayward, United States attorney for the Southern District of New York, its attorney, and makes its assignments of error, respectfully showing that the court below erred in each of the following particulars:

1. In making its judgment sustaining the demurrer to the indictment herein and dismissing the indictment against the above-named defendants in error.

2. In construing the statute upon which the indictment is founded, namely, the act of December 17, 1914, 38 U. S. Stat. L., p. 785-6, as amended by the act of February 24, 1919, 40 U. S. Stat. L., p. 1130, so as to hold that the said indictment does not state a crime and is fatally defective because it does not allege that the acts were done by the defendants wilfully.

3. In construing the said statute so as to hold that the said indictment does not state a crime and is fatally defective because it does not allege that the acts were done by the defendants knowingly.

4. In construing the said statute so as to read into it the word "wilfully."

15 5. In construing said statute so as to read into it the word "knowingly."

Wherefore plaintiff in error prays that said judgment be reversed and that such proceedings be thereafter had accordingly.

July 27, 1921.

WILLIAM HAYWARD,

United States Attorney for the Southern District of New York, Attorney for Plaintiff in Error. Office & Post Office Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Service admitted.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Jul. 28, 1921.

16 By the Honorable John C. Knox, one of the Judges of the District Court of the United States for the Southern District of New York, in the second circuit.

To the defendants Frank Balint and Alfonso Randazzo, greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden at the Capitol, at Washington, District of Columbia, on August 26th, 1921, pursuant to a writ of error filed in the office of the clerk of the United States District Court for the Southern District of New York, wherein the United States of America is plaintiff in error and Frank Balint and Alfonso Randazzo are defendants in error, to show cause, if any there be, why the judgment sustaining the demurrer herein and dismissing the indictment found against the said Frank Balint and Alfonso Randazzo, defendants in error, in said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness: Honorable Learned Hand, United States district judge for the Southern District of New York, at New York City, in the said Southern District of New York, this 28th day of July, 1921.

John C. Knox,

United States District Judge.

(Indorsement on cover:) File No. 28,435. S. New York, D. C. U. S. Term No. 480. The United States of America, plaintiff in error, vs. Frank Balint and Alfonso Randazzo. Filed August 17th, 1921. File No. 28,435.